Google Inc. et al v. Egger et al Doc. 333 Att. 10

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Center for Constitutional Rights, Tina M. Foster, Gitanjali S. Guiterrez, Seema Ahmad, Maria Lahood, Rachel Meeropol, Plaintiffs	06-CV-00313
v.	Hon. Gerard E. Lynch
George W. Bush, President of the United States; National Security Agency, Lieutenant General Keith B. Alexander, Director, Defense Intelligence Agency; Lieutenant General Michael D. Maples, Director; Central Intelligence Agency, Porter J. Goss, Director; Department of Homeland Security, Michael Chertoff, Secretary; Federal Bureau of Investigation, Robert S. Mueller III, Director; John D. Negroponte, Director of National Intelligence, Defendants.	Magistrate Judge Kevin N. Fox

BRIEF ON BEHALF OF *AMICI CURIAE* BUSINESS LEADERS IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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April 20, 2006

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BRIEF ON BEHALF OF *AMICI CURIAE* BUSINESS LEADERS IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Amici Roland Algrant, Adam Kanzer, Michael Kieschnick, Joe Sibilia, Peter Strugatz, and Mal Warwick are international and domestic business leaders who respectfully submit this brief in support of Plaintiffs' motion for partial summary judgment.

I. THE INTERESTS OF *AMICI*

It is axiomatic that a government's respect for, and adherence to, the rule of law is a necessary predicate to maintaining a vibrant and stable economy. This is particularly true in the arena of international business and finance, in which the risks and uncertainties of doing business are frequently at their zenith. In order for this country's international and domestic commerce to continue to thrive, it is imperative that the United States be perceived on the world stage as rigorously upholding its own laws, particularly with respect to the confidentiality of telephonic and electronic communications.

With the proliferation of electronic communications, the amount of sensitive personal, commercial and financial information that businesses exchange on a daily basis has grown exponentially. Accordingly, over the past decade, it has become a national priority of both Congress and federal regulators to ensure the privacy and confidentiality of such communications in order to foster the economic growth that can be achieved only when consumers and trading partners can have confidence in the security of their confidential communications. The administration's recently-exposed program of conducting secret electronic surveillance of communications to and from American citizens in the United States without probable cause, without a warrant, and without any judicial oversight is patently unlawful and risks severely undermining that requisite confidence. As such, it threatens to chill the international communications and the free flow of electronic information on which thousands of American businesses depend for their lifeblood.

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International telephone service is one of the many services that Working Services provides to its customers. Mr. Kieschnick has written several books on capital markets and development, most recently *Credit Where It's Due* (with Julia Parzen), the authoritative study of development banking.

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II. THE ACTUAL AND PERCEIVED CONFIDENTIALITY OF WIRE AND ELECTRONIC COMMUNICATIONS IS AN IMPORTANT BUSINESS ASSET ON WHICH MANY BUSINESSES DEPEND.

The administration contends that its warrantless surveillance of American citizens in the United States is, in fact, directed only against terrorists or "the enemy."[1] At bottom, however, its position is no different from the administration's arguing that it should be allowed to conduct warrantless searches of American citizens in any context. The issue is not whether the administration may search *vel non*; the issue is whether the administration must obtain a warrant and satisfy established standards of probable cause or reasonable suspicion. Despite rhetoric to the contrary, at risk in this case are not simply communications by terrorists or "the enemy," but rather countless communications between American citizens and persons around the world in a myriad of contexts. Because a substantial percentage of those communications constitute a critical component of American's global and domestic business economy, the privacy and confidentiality of those communications are central to America's economic interests.

International commerce and finance is a dominant segment of the United States economy. In 2005, the value of imports and exports of goods alone exceeded \$2.5 trillion.[2] Indeed, in the years ahead, international trade and finance is likely to be *the* most critical component of our nation's economy.[3] Myriad positive consequences flow from international commerce, including higher standards of living (domestically and abroad), greater productivity, increased technological development and the achievement of foreign policy goals. See, e.g., Economic Report of the President 155 (Feb. 2006) at ("Studies show that firms that are engaged in the international marketplace tend to exhibit higher rates of productivity growth and pay higher wages and benefits to their workers. An economy with higher overall productivity growth can support faster GDP growth without generating inflation. And higher productivity growth means higher sustainable living standards."); Peter S. Canellos, In Reach For Middle Ground, Bush Echoes Bill Clinton, Boston Globe, Feb. 1, 2006, at A18 ("Bush's speech last night represented his first major attempt to fuse his vision of an activist foreign policy, seeking to topple tyrants and promote democracy, with an economic program that recognizes the importance of international trade and leadership.").[4]

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[1] See Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence, (Dec. 19, 2005) (Attorney General Gonzales describing the plan as giving them the authority "to confront the enemy that we are at war with -- and that is al Qaeda and those who are supporting or affiliated with Al Qaeda."),available at http://www.whitehouse.gov/news/releases/2005/12/print/20051219-1.html.

[2] See 2005 Exports of HS Total All Merchandise, U.S. Dep't of Commerce, Office of Trade and Indus. Info., Int'l Trade Admin.

[3] Economic Report of the President 5 (Feb. 2006) available online at http://a257.g.akamaitech.net/7/257/2422/13feb20061330/www.gpoaccess.gov/eop/2006/2006_erp.pdf ("Because 95 percent of the world's customers live outside of our borders, opening international markets to our goods and services is critical for our economy.").

In order to conduct any large scale business — international or domestic — in the modern global economy, international telephonic and electronic communications must be secure and, perhaps more importantly, must be *perceived* by customers, investors and business partners to be secure. The actual and perceived security of business communications, including private financial data and confidential proprietary business information, are valuable assets for American businesses — assets that are jeopardized by the administration's warrantless surveillance program. Indeed, a lack of confidence in the security of business communications, prompted by the mere threat of governmental surveillance that is unfettered by any particularized establishment of probable cause, will significantly chill American businesses' communications with their international customers, investors and business partners.[5]

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[4] See also Economic Report of the President at 158 ("Firms exposed to global competition are exposed to the world's best practices in areas such as supply management, production processes, technology, and finance. Studies show that firms exposed to the world's best practices demonstrate higher productivity through many channels, such as learning from these best practices, and also creating new products and processes in response to this exposure.").

One industry in constant need of assurances of confidentiality is the world of international publishing. As always, many of today's best-selling books are about current political events. Thus, today, many of those best-selling books are about the wars in Iraq and Afghanistan, the threat of international terrorism, and the administration's efforts to combat that terrorism. And, of course, many such works are highly critical of either United States policies or of the foreign regimes at which those policies are aimed.

In order to produce and distribute such works, publishers and their authors must make thousands of highly confidential telephonic and electronic communications to and from points outside the United States. Publishers must be in constant communication with their authors, many of whom might be on location in foreign countries. Likewise, authors in this country must have repeated communications with confidential sources in foreign countries. These communications often can be of an extremely sensitive nature and can expose authors and their sources to grave professional and personal risk. In turn, to distribute these and other controversial works, publishers must have frequent telephonic and electronic communications with wholesalers, retailers and others in countries that neither value nor protect the freedoms of speech and thought that historically have been valued in this country.

In this environment, the revelation of the administration's unfettered secret electronic surveillance of international communications has raised the very reasonable perception that no

[5] Experts have reported that direct investment in the United States from the Middle East in particular has been significantly less extensive than it otherwise should have been because "Middle Eastern investors are . . . skittish about investing in the United States" in part because of a "fear about what might befall their holdings at the hands of U.S. authorities." Paul Blustein, Mideast Investment Up in U.S., Wash. Post, Mar. 7, 2006, at A1.

otherwise private communication can be guaranteed to remain confidential. Additionally, the administration's refusal to comply with the domestic surveillance limits imposed by Congress, discussed more fully in Section III infra, undermines confidence in the rule of law. Thus, even where the law prohibits surveillance and even where, unlike the *status quo*, the administration abides by those limits, the fact that the United States has a history of secret wiretapping regardless of the law as written will cause foreign individuals and groups to question whether they can trust this nation to abide by its own laws. The administration's secret wiretapping program has chilled, and will continue to chill, the efficient flow of electronic communications that are critical to many of the publishing industry's transnational ventures.

The fields of international and domestic finance and trade are equally dependent on the ability of businesses to assure investors, customers and business partners of the privacy and confidentiality of their communications. In today's world economy, virtually *all* foreign and domestic commerce depends on international communications, and virtually all such communications are conducted via telephonic and electronic means. The competitive marketplace has increasingly demanded the immediacy that only telephonic and electronic communications can offer. Those communications, moreover, involve the exchange of unprecedented volumes of highly confidential personal financial data, individual and institutional investment profiles, and proprietary trade secrets.

As early as 1968, Congress recognized that uncertainty regarding the confidentiality of such private communications is bad for business. As it explained, "*to prevent the obstruction of interstate commerce*, it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." Congressional Findings in support of Title III, 18 U.S.C. § 2510 et. seq., Pub. L.

No. 90-351, §801, Stat. 197, 211 (1968) (emphasis added). More recently, as the spread of electronic personal financial data and other information has proliferated, industry, consumers and government all have agreed that guaranteeing the privacy of electronic communications is critical to fostering an environment in which business can flourish.[6] In 1999, during the Senate hearings on the Online Privacy Protection Act, Senator Burns explained that "the single greatest reason consumers do not buy goods online is because of the concerns of privacy." S. 809, Online Privacy Protection Act of 1999: Hearings Before the Subcomm. on Commc'ns of the S. Comm. on Commerce, Science & Transp., 106th Cong. 2 (1999) (statement of Sen. Conrad Burns). As another member of the Subcommittee on Communications explained, "there appears to be agreement that the biggest impediment to commerce on the Internet is the public concern about privacy." Id. at 4 (comments of Sen. Richard H. Bryan).[7]

Similarly, it has been widely recognized that just as preserving the privacy and the perception of privacy of personal financial data is a critical business asset in the modern marketplace, so too is the preservation of the actual and perceived security of confidential business information. Confidential business information may include security secrets, trade secrets, and "positional information." See generally Peter P. Swire, Efficient Confidentiality for Privacy, Security, and Confidential Business Information, in Brookings-Wharton Papers on Financial Services 294 (Robert E. Litan & Richard Herring eds., 2003); id. at 288 (explaining that positional information — the kind of information that improves the position of the company in a negotiation or business setting — is "less often litigated [than security or trade secret information] but is perhaps more important in the business world."). Swire has also examined the economic costs and benefits for businesses maintaining confidential business information and has concluded that even perceived threats of possible insecurity ultimately raises costs for business and inevitably produced a "chilling effect on business activity." Id. at 289.

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[6] See, e.g., Gayle Horn, Online Search and Offline Challenges: The Chilling Effect, Anonymity, and the New FBI Guidelines, 60 N.Y.U. Ann. Surv. Am. L. 735, 748 n.73 (2005) ("Knowledge that the FBI can perform extensive surveillance (even if covert) or a belief that the FBI will perform extensive surveillance may 'chill' an individual from acting even if he or she is unaware that he or she is the target of an investigation."); Steven A. Hetcher, Norm Proselytizers Create a Privacy Entitlement In Cyberspace, 16 Berkeley Tech. L.J. 877, 878-83 (2001) (discussing, *inter alia*, the ways in which consumers expect privacy in their communications and "punish" businesses that are perceived as not adequately protecting their confidential information).

[7] The recent boom in legislation intended to protect the confidentiality of private financial information in the electronic marketplace include, among others, the Electronic Communications Privacy Act of 1996, 18 U.S.C. § 2510 et seq.; the Financial Modernization Act of 1999 (also known as the "Gramm-Leach-Bliley Act") (1999) (codified as amended in scattered sections of 12 U.S.C. and 15 U.S.C.); Childrens' Online Privacy Protection Act, 15 U.S.C. §§ 6501, 6505 (Supp. 2000); Disclosure of Nonpublic Personal Information, 15 U.S.C. §§ 6801-6809 (2000)). More recently, Congressman Lamar Smith introduced the Law Enforcement and Phone Privacy Protection Act of 2006 with the following: "Few things are more personal and potentially more revealing than our phone records. The records of whom we choose to call and how long we speak with them can reveal much about our business and personal lives. . . . It may even disclose our physical location." 152 Cong. Rec. E90-01 (daily ed. Feb. 8, 2006).

It thus is no solace to American business that the administration claims to eavesdrop only on communications of persons that NSA employees believe to be affiliated with al Qaeda.[8] Simply put, the administration makes mistakes, often with devastating consequences. In 2004, for example, Brandon Mayfield, a Portland, Oregon attorney, was mistakenly targeted as a terror suspect in the March 2004 Madrid train bombing. For Mayfield, the consequences involved months of FBI surveillance (including secret forays into Mayfield's home and office) and physical incarceration. See Mark Larabee & Ashbel S. Green, One Mistaken Clue Sets a Spy Saga in Motion, The Oregonian, Mar. 26, 2006, at A1. Similarly, Army Captain James Yee was the subject of intense investigation and prolonged detention — including 76 days in solitary confinement — before the administration dropped all terrorism charges against him. See Laura

[8] See Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence, Dec. 19, 2005 (Attorney General Gonzales describing the plan as giving them the authority "to confront the enemy that we are at war with -- and that is al Qaeda and those who are supporting or affiliated with Al Qaeda."), supra note 1.

Parker, The Ordeal of Chaplain Yee, USA Today, May 17, 2004, at A1; see also Luke Harding, Rice Admits U.S. mistakes in War on Terror After Wave of Criticism Across Europe, The Guardian, Dec. 7, 2005, at 24 (Khalid Masri, a German national, was "mistakenly kidnapped by the CIA in December 2003" and "spent five months in a freezing Afghan jail"). These are by no means isolated incidents: it has been estimated that *over 30,000 people* have been misidentified and erroneously placed on the administration's terrorist watch list. See Joe Sharkey, Jumping Through Hoops to Get Off the No-Fly List, N.Y. Times, Feb. 14, 2006, at C8.[9] And these are the errors of which the victim is made aware. When the administration makes mistakes in the context of secret surveillance, no one ever knows.

In the name of protecting national security, the administration has cast such a wide net, to say the least, that trusting them to eavesdrop only on terrorist is not an option. Any responsible American business has little choice but to take seriously the possibility that the government could be eavesdropping on its international telephone calls and electronic communications. It is precisely this fear that stands to chill American business interests, and it was precisely for that reason that the Supreme Court made clear that "[i]t is, or should be, an important working part of our machinery of government . . . to check the well-intentioned but mistakenly over-zealous executive officers who are a party of any system of law enforcement." United States v. United

[9] See also, e.g., Algerian Pilot Threatens to Sue in 9/11 Case, N.Y. Times, Aug. 15, 2002, at A3 (after being arrested September 21, based on a "request from American investigators," Lotfi Raissi spent "five months in British prison on suspicion of training Sept. 11 hijackers" before all charges were dropped); Sara Kehaulani Goo, Sen. Kennedy Flagged by No-Fly List, Wash. Post, Aug. 20, 2004, at A1 (Senator Edward Kennedy "was stopped and questioned at airports on the East Coast five times in March because his name appeared on the government's secret 'no-fly' list. Federal air security officials . . . privately...acknowledged being embarrassed that it took the senator and his staff more than three weeks to get his name removed."); Sara Kehaulani Goo, Law Lets Passengers Appeal No-Fly List, Wash. Post, Dec. 18, 2004, at A21 ("Rep. John Lewis (D-Ga.)... has been stopped dozens of times because his name is confused with another on the TSA's secret no-fly list.").

States Dist. Court for the Dist. of Mich. ("Keith"), 407 U.S. 297, 315-16 (1972) (internal quotation marks omitted).

III. THE ADMINISTRATION'S WARRANTLESS WIRETAPPING PROGRAM IS PATENTLY UNLAWFUL.

As stated at the outset, it is critical to U.S.-based international business interests that the United States be perceived as honoring and enforcing its own rule of law with respect to government surveillance of international communications. Indeed, the mere threat of unlawful government surveillance risks seriously undermining the confidence that consumers and business partners have in the security of their communications with American businesses. For the reasons set forth below, and for the reasons set forth in the Plaintiffs' Motion for Partial Summary Judgment, it is abundantly clear that the administration's warrantless wiretapping program is patently contrary to the rule of law in this country.

The applicable rule of law in this country is straightforward. The Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. § 1801, et seq. and Title III of the Omnibus Crime Control and Safe Streets Act ("Title III"), 18 U.S.C. § 2510, et seq. together provide "the exclusive means by which electronic surveillance . . . may be conducted." 18 U.S.C. § 2511(2)(f). FISA was enacted specifically to curb perceived abuses by the executive in conducting surveillance in the name of national security and made clear that "the executive cannot engage in electronic surveillance within the United States without a prior judicial warrant." S. Rep. No. 95-604(I), at 6 (1978), reprinted in 1978 U.S.C.C.A.N. 3904, 3908. FISA thus provides detailed procedures that require the Executive to obtain a warrant from a specialized court when conducting foreign intelligence surveillance,[10] including, expressly, against groups and individuals engaged in international terrorism.[11]

Here, the administration has publicly conceded that the challenged wiretapping program does *not* even attempt to comply with FISA's warrant requirement. [12] See Attorney General Alberto Gonzales, Ask the Whitehouse (Jan. 25, 2006), available at http://www.whitehouse.gov/ask/20060125.html, explaining the differences between the NSA program and FISA. Rather, it contends that Congress meant to ignore FISA's clear command and authorized the domestic warrantless wiretaps when it authorized the use of "all necessary and appropriate force" against the perpetrators of the September 11 attacks. See Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence, Press Briefing (citing the Authorization for Use of Military Force against al Qaeda ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001)). That argument is specious.

Nothing in the phrase "necessary and appropriate force" can be read as Congress's intent to jettison the "exclusive means" of engaging in foreign intelligence surveillance that Congress carefully spelled out in FISA. Indeed, virtually contemporaneously with its adoption of the AUMF, Congress amended FISA so that its warrant and other requirements expressly would apply to intelligence efforts against al Qaeda and suspected al Qaeda operatives.[13] The

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10 See 50 U.S.C. § 1802.

11 See 50 U.S.C. § 1801.

12 FISA also provides for limited exceptions to its warrant requirement in times of national emergency, 18 U.S.C. § 2518, and in the immediate aftermath of a formal declaration of war, 50 U.S.C. § 1811. The administration has likewise conceded that neither of these exceptions currently apply.

13 See Elizabeth B. Bazan, CRS Report for Congress, Order Code RL30465, The Foreign Intelligence Surveillance Act: An Overview of the Statutory Framework for Electronic Surveillance, at CRS-9 n.19 (Updated Apr. 21, 2005) available at http://www.fas.org/sgp/crs/intel/RL3046.pdf ("'Foreign intelligence information' is defined in 50 U.S.C. § 1801(e) to mean (1) information that relates to, and if concerning a United States person is

administration, moreover, has publicly admitted that it did not seek authorization for warrantless wiretaps because it believed that Congress would have denied such authorization. [14]

Nor can the phrase "necessary and appropriate force" reasonably be interpreted to suggest Congress's intent to circumvent over three decades of the Supreme Court's Fourth Amendment jurisprudence. In Katz v. United States, 389 U.S. 347 (1967), the Supreme Court made clear that individuals possess a protected reasonable expectation of privacy in their telephonic and electronic communications. Id. at 351-52. Five years later, the Court extended that proposition and held that warrantless surveillance of telephonic and electronic communications was unconstitutional, even where the Executive claimed that such surveillance was in the interest of domestic national security. Keith, 407 U.S. at 313-14. There, the Court explained that

> [n]ational security cases . . . often reflect a convergence of First and Fourth Amendment values . . . . Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.'

Id. The Court thus concluded that

> Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch. The Fourth Amendment does not contemplate the executive officers of Government as neutral

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necessary to, the ability of the United States to protect against — (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to — (A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States.")

[14] Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005) available online at http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html ("[w]e were advised [by members of Congress] that [amending FISA] would be difficult, if not impossible.")

> and disinterested magistrates. . . . The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech. . . . [T]his Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence . . . and voluntarily confined their activities to the least intrusive means . . . . The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised.

Id. at 316-17 (internal quotation marks and footnote omitted). Together with FISA, these bedrock principles of Fourth Amendment law must inform and limit this Court's interpretation of the scope of the "appropriate force" that Congress authorized in the AUMF. And against such a backdrop, the administration's reliance on the AUMF must be rejected.

Finally, it is equally unavailing for the administration to invoke its inherent foreign affairs authority under Article II of the United States Constitution. Once again, the rule of law in this country is clear: "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (plurality opinion). As the United States Supreme Court has long recognized, "emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. . . . [E]ven the war power does not remove constitutional limitations safeguarding essential liberties." Home Building & Loan Assoc. v. Blaisdell, 290 U.S. 398, 425-26 (1934). Rather, "[w]hatever power the United States Constitution recognizes for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." Hamdi, 542 U.S. at 536 (plurality opinion).

Here, Congress exercised its role by adopting FISA and expressly subjecting the Executive's foreign intelligence efforts to FISA's specialized warrant requirements. Perhaps more importantly, under the Constitution, it is the institutional role of the judiciary to impose a meaningful check — as the neutral and detached decisionmaker — on executive action that threatens the constitutional liberty and right of the American people to be free from unreasonable searches and seizures. See generally Keith, 407 U.S. at 316 (emphasizing fundamental importance of requiring that a "neutral and detached magistrate" issue a warrant on a showing of probable cause); Hamdi, 542 U.S. at 509. (holding that the government's factual assertions, even in the context of allegations against citizens held on suspicion of terrorist activity against the United States, must be subject to review before "a neutral decisionmaker") (plurality opinion); Katz, 389 U.S. at 357 ("the Constitution requires that the deliberate, impartial judgment of a judicial officer be … interposed between the citizen and the police") (alteration in original, internal quotation marks omitted). The Constitution *requires* the judiciary to perform this institutionally assigned role. The administration's contention that its foreign affairs powers nevertheless entitle it to circumvent the judiciary altogether when eavesdropping on the private communications of American citizens lies wholly outside the established rule of law in this country and cannot be countenanced.

CONCLUSION

For the foregoing reasons, this Court should grant the Plaintiffs' motion for summary judgment.

Respectfully submitted,

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April 20, 2006